



AUSTRALIAN BANKERS' ASSOCIATION INC.

Ian Gilbert
Director

Level 3, 56 Pitt Street
Sydney NSW 2000
Telephone: (02) 8298 0406
Facsimile: (02) 8298 0402

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Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on legal and
Constitutional Affairs
Department of the Senate
Parliament House
CANBERRA ACT 2600

By Email : legcon.sen@aph.gov.au

Dear Mr Hallahan

Personal Property Securities Bill 2008 – Exposure Draft (Bill)

The Australian Bankers' Association (ABA) is the national body representing 24 banks authorised by the Australian Prudential Regulation Authority to carry on banking business in Australia.

The ABA's membership includes the four major Australian banks, regional banks that have a national focus and a number of foreign banks some of which conduct retail banking business in Australia.

The ABA supports the Commonwealth Government's desire to reform the law in Australia relating to personal property securities (PPS) and to establish a single national electronic register under a Commonwealth law.

The proposed reforms by the Government are designed to facilitate a streamlined and cost effective approach by all financiers in Australia to the financing of individuals and businesses that is to be secured against personal property.

The reforms have the potential to provide greater legal certainty, efficiencies and convenience for financiers and their customers.

Implementation of the reforms by ABA's members will involve substantial changes to their IT systems (see "Information Technology Issues" below) and finance and security documentation, require the development of new procedural manuals to guide their employees and necessitate extensive training of their employees in the new law. It has been said that to approach PPS law reform financiers and

practitioners will need to "un-learn" the current law and approach the new law as a major learning experience.

The New Zealand authors of "*Personal Property Securities Act – a conceptual approach*" (Widdup and Mayne 2002 at p2) describe the experience in New Zealand with its Personal Property Securities Act 1999 as follows:

The PPSA is a complicated, provocative, and yet fascinating scramble of legislation. Although it initially overwhelms many lawyers, the deeper one explores its secrets, the more one appreciates how innovative it is. Once the unfamiliar concepts and strangeness wears off, it is apparent that it is a well-knit piece of legislation, though not without its faults, that provides uniform rules that, in comparison to pre-PPSA law operate and provide answers consistently and predictably"

Current financial market conditions and uncertainties in credit markets reinforce, if not dictate, the importance of ensuring there is sufficient time for the provisions of this Bill to be properly understood by all concerned. This will mean that to the extent the Bill "*initially overwhelms*" there is the opportunity for that "*deeper*" exploration of the Bill's "*secrets*" for which there is increasing concern.

Following the Committee's deliberations on the Bill it may be expected that additional amendments may need to be made to the Bill adding to the timing question.

Further, it is equally critical that the finance sector has sufficient time to bring their systems, documents and employees into a state of readiness so that they and their customers, consumers and businesses, can reap the benefits of the reforms with confidence and certainty.

It is relevant to point out that in parallel with the PPS reforms the Commonwealth Government is also proceeding with its Phase 1 proposals to enact Commonwealth consumer credit and finance broker legislation, to regulate and license credit providers and finance brokers and to regulate margin lending. These reforms are proposed to be in place by 1 July 2009.

The Government is also proceeding with consultations on the implementation of the Australian Law Reform Commission's proposals to substantially reform Australia's privacy laws. Stage 1 of this process will occur over the same period as the PPS reform processes are to be conducted.

The Commonwealth Attorney-General's Department, has consulted widely and extensively over the past two or more years in an endeavour to ensure there is a high level of knowledge and general understanding of the proposed reforms. The Department has made itself readily available to consult on the proposed reforms and to address specific concerns that have been raised with the Department. The Department and its officers are to be commended for their endeavours in these respects.

The PPS project is being overseen by the Council of Australian Governments (COAG), the Standing Committee of Attorneys General and various Ministerial

Councils. The Commonwealth Government has the primary role for the implementation of the decision of the COAG to reform the PPS regime against a commencement date of 1 May 2010.

To achieve that commencement date the Government needs to finalise the terms of the Bill in the first half of 2009 to secure transfers of power from the States and Territories in the terms of the Bill to ensure the regime is a single, nationally effective one. Following this the Bill must be passed by the Commonwealth Parliament, the national electronic register established and registrations of PPS interests held in State and Territory registers transferred to the national register and reconciled. This is undoubtedly a very demanding timetable. It means that the timeframe for consideration of the Bill and its amendments and for the Committee to deliberate on the Bill as a whole is extremely short given the extent of the law reform involved.

The ABA welcomes the release of the Bill and that your Committee has been commissioned to undertake this enquiry into the Bill.

It is evident that substantial amendments have been included in the Bill that were raised in earlier submissions on the Consultation Draft bill in August and September 2008 by a range of interested parties. Some of these amendments are extensive and technically difficult. Reasons behind a number of these amendments are yet to be fully understood. There is an important need for there to be sufficient time to consider these amendments in the Bill and the reasons for them as a whole. The release of the Bill to your Committee is the first time that interested parties outside of Government have seen the Bill.

The ABA is concerned about the risk that difficulties with the Bill, once enacted into law, may surface which, because of the time constraints now, a longer period of deliberation might have allowed identification of these problems and the opportunity to deal with them beforehand.

So often it is the case with any regulatory change that the real operational issues only start to appear when implementation of the changes commences.

The ABA is seeking to engage further with the Attorney General's Department to work through a range of technical issues and interpretations in the Bill.

This is intended to obviate the need for these matters of technicality to be raised with the Committee, perhaps unnecessarily.

There are some other matters that the ABA briefly wishes to emphasise and bring to the attention of the Committee and these are set out in the following paragraphs.

Information Technology issues

A key element to the success of PPS law reform will be the successful interfacing between banks' IT systems and the new on-line register. Banks will have multiple IT systems which will be impacted by the new reforms and there will be considerable expenditure (running into the millions of dollars) to design, build and

test the interface into the new online register. The ABA welcomes the establishment, by the Attorney-General's Department, of an Information Technology working group which held its first meeting in December 2008, and it is understood that interface specifications will be available in April 2009. The definition and form of these interfaces will be key to determining the complexity of the overall implementation.

Therefore it is imperative that there be sufficient time before commencement of the register (currently scheduled for 1 May 2010) to ensure that banks can update their IT systems and minimise the risk of disruption when the switch over occurs. Given that the primary legislation has not been introduced, the regulations (which will contain much of the operational detail) have not been released and IT interface specifications are not known, it is becoming increasingly apparent that a May 2010 start date may not be achievable. If the commencement date remains as 1 May 2010, ABA members request ongoing liaison as to the commencement date and recognition that extra time may be necessary to ensure successful implementation of the reforms.

Section 235

Section 235 seeks to impose on all parties an obligation to act honestly (to which the ABA takes no objection) and in a "commercially reasonable manner" in the exercise or discharge of all rights, duties and obligations under a security agreement.

The basis for the inclusion of this section in the Bill is unclear. Its inclusion is unrelated to the objectives of the Bill, namely to reform the laws relating to PPS. It is not made clear why this provision is necessary or convenient to this central objective particularly as it singles out PPS financing for the imposition of the proposed obligation. The ABA is not aware of any research indicating a market failure warranting the inclusion of such a provision in the Bill.

The meaning of "commercially reasonable manner" is unclear and is likely to lead to uncertainty in performance of security agreements.

For courts to give clarity to the section they would have to substitute their views about the commercial decisions of others. There is common law and statute (see for example Australian Securities and Investments Commission Act 2001 (sections 12CB and 12CC) that provide for relief where a party has engaged in unconscionable conduct in relation to the supply of financial services. Section 12DJ of the ASIC Act provides protection for consumers against undue harassment or coercion in connection with the supply of financial services or the payment for financial services.

It is unclear what further protection is necessary or envisaged to be given by section 235 particularly as the section is likely to introduce uncertainty into consumer and business transactions.

The ABA submits that the section should be deleted from the Bill.

Conflicts of laws

There is a question whether the Bill should deal with conflicts of laws or leave resolution of these matters to the general law.

In principle, as the PPS regime is intended to operate as a nationally consistent law under the Bill once enacted as law, it would be appropriate and convenient for the Bill to be the source for guidance on the resolution of conflicts of law. There will be areas of law where the States and Territories have retained responsibility for certain transactions, for example the legal requirements for an effective assignment, and where the Bill can resolve potential conflicts between a State's regime and the PPS regime concerning registration of an assignment.

The Bill does not cover conflicts of laws that have an international dimension. Attorney General's Department has developed a proposed model to deal with these conflicts and has invited comment. The ABA will consider the proposed model in consultation with its members and the Department and respond accordingly. At this stage, the ABA is not aware of any reason why the principle that the Bill should endeavour to deal with conflicts of laws should not apply to conflicts of laws in relation to PPS that have an international dimension.

Concluding comment

In concluding, to alleviate some of the timing issues raised by the ABA in this submission, the ABA queries whether there may be a mechanism by which the Government, in consultation with the States and Territories, is able to expediently address significant issues that arise in the application or interpretation of the legislation and have, or are likely to have, adverse impacts on the finance industry that are identified either before commencement of the legislation or later when the relevant impacts surface.

In the circumstances, the Committee may wish to consider and recommend that in the interests of an orderly transition to and implementation of the new PPS regime that the commencement date of 1 May 2010 should be extended accordingly. The ABA would be supportive of a recommendation to extend the commencement date for the regime.

The ABA welcomes the opportunity to assist the Committee in its deliberations on the Bill and appreciates the additional time available to make this submission.

Yours sincerely



Ian Gilbert